AUG 27 1
JOHN F. DAVIS,

IN THE

Supreme Court of the United States

October Term, 1962

No. 376

PRESTON COBB, JR.,

Petitioner,

v.

THE STATE OF GEORGIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

DONALD L. HOLLOWELL,
859½ Hunter Street, N. W.
Atlanta 14, Georgia,

Attorneys for Petitioner.

BARBARA A. MORRIS,
HORACE T. WARD,
of Counsel.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Statement	2
Question Presented	6
Reasons for Allowance of the Writ	6
Conclusion	13
Appendix—Opinion of Supreme Court of Georgia	15
Judgment of the Supreme Court of the State of Georgia	32
Order of Supreme Court of Georgia Denying Petition for Rehearing	32

Table of Cases

Aetna Ins. Co. v. Kennedy, 301 U. S. 389	9
Akins v. Texas, 325 U. S. 398	7, 8
Anderson v. Alabama, 366 U. S. 208	7
Avery v. Alabama, 308 U. S. 444	10
Avery v. Georgia, 345 U. S. 559	7
Cassell v. Texas, 339 U. S. 282	8
Chambers v. Florida, 309 U. S. 227	9
Crumb v. State, 205 Ga. 547, 54 S. E. 2d 639	8
Emspak v. United States, 349 U. S. 190	9, 11
Eubanks v. Louisiana, 356 U. S. 584	8
Ex parte Virginia, 100 U. S. 339	7
Fay v. New York, 332 U. S. 261	9
Gibbs v. Burke, 337 U. S. 773	9, 11
Glasser v. United States, 315 U. S. 60	9, 10, 11

PAGE

Hale v. Kentucky, 303 U. S. 613 7
Hallowell v. United States, 197 F. 2d 926 (CA 5, 1952) 9, 12
Hawk v. Olsen, 326 U. S. 271 10
Hernandez v. Texas, 347 U. S. 475 8
Hill v. Texas, 316 U. S. 400 8
Hodges v. Eaton, 106 U. S. 408 9
House v. Mayo, 324 U. S. 42 10
Hudson v. North Carolina, 363 U. S. 697 9

Johnson v. Zerbst, 304 U. S. 458 ..... 9, 11

Moore v. Michigan, 355 U. S. 155 ..... 9, 11

Neal v. Delaware, 103 U. S. 370 7
Norris v. Alabama, 294 U. S. 587 ..... 7, 8, 9

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292 9

Palmer v. Ashe, 342 U. S. 134 12
Patton v. Mississippi, 332 U. S. 463 ..... 7, 8
Pennsylvania v. Claudy, 350 U. S. 116 ..... 9, 11
Pierre v. Louisiana, 306 U. S. 354 9
Powell v. Alabama, 287 U. S. 45 10

Reece v. Georgia, 350 U. S. 85 8
Rice v. Olsen, 324 U. S. 786 ..... 9, 11

Shepherd v. Florida, 341 U. S. 50 7
Smith v. Texas, 311 U. S. 128 8
Smith v. United States, 337 U. S. 137 ..... 9, 11
Spano v. New York, 360 U. S. 315 9
Strauder v. West Virginia, 100 U. S. 303 7

Tomkins v. Missouri, 323 U. S. 485 ..... 9, 11

United States ex rel. Goldsby v. Harpole, 263 F. 2d 71 (CA 5, 1959) 9, 10, 12, 13
Uveges v. Pennsylvania, 335 U. S. 437 ..... 9, 11

PAGE

Von Moltke v. Gillies, 332 U. S. 708 ..... 9, 10, 11

White v. Ragen, 324 U. S. 760 10

Williams v. Georgia, 349 U. S. 375 7

Williams v. Huff, 146 F. 2d 866 (CA DC, 1945) 9, 12

Williams v. State, 210 U. S. 665, 82 S. E. 2d 217, remanded for reconsideration, 349 U. S. 375, reconsidered and affirmed, 211 Ga. 763, 88 S. E. 2d 376, cert. denied, 350 U. S. 950 8

Wood v. United States, 128 F. 2d 265 (CA DC, 1942) 9

IN THE

Supreme Court of the United States

October Term, 1962

No.

PRESTON COBB, JR.

Petitioner,

v.

THE STATE OF GEORGIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on May 14, 1962, in the above-entitled cause.

Opinion Below

The opinion of the court below is reported at 126 S. E. 2d 231 and is appended hereto, infra at page 15.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on May 14, 1962, and petition for rehearing was denied on May 28, 1962. The May 14 decree and the May 28 order are appended hereto, infra at page 32. Jurisdiction to review the judgment of the Supreme Court of Georgia is granted to this Court under the provisions of Title 28, United States Code, § 1257(3).

Statement

Petitioner was tried and convicted of murder in the Superior Court of Jasper County on August 16, 1961, without a recommendation of mercy (R. 16). On the same day, petitioner was sentenced in open court to death by electrocution, said sentence to be executed on September 22, 1961 (R. 17-18). Jasper County in which the crime took place is in the Piedmont Belt of Georgia and is a rural and agricultural area.

Petitioner is a Negro, and decedent was white. At the time of his trial, conviction and death penalty, petitioner was 15 years of age (R. 88). He is the sixth of nine children (R. 94), and his father is dead. He and his family lived on the decedent's land, and petitioner and his mother worked there (R. 88, 89). Petitioner completed eight grades of schooling but had dropped out of school for good, approximately one year before the instant proceedings began (R. 88, 93). Prior to this, petitioner had never been in trouble (R. 93, 94).

Shortly after the decedent's body was discovered, petitioner was picked up, questioned and gave a statement to the police, which was introduced in evidence against him (R. 52-54). On June 1, 1961, petitioner was indicted by the grand jury (R. 14) and was brought to trial on August 16, 1961 (R. 49). He was unable to employ counsel of his own choosing, and the court appointed J. Ben Warren, a local white attorney, to act as his defense counsel (R. 49).

No challenge was made to the composition of the grand jury or the traverse jury, either before arraignment or during the course of the trial (R. 36). After petitioner had been tried, convicted and sentenced to death, Mrs. Cobb, his mother, went to the N.A.A.C.P. office in Atlanta, Georgia seeking help (R. 114-117). She was referred to Donald L. Hollowell and Horace Ward, attorneys in At-

lanta, and retained them to act in her son's behalf (R. 108-109).

The entrance of the Atlanta attorneys into the picture was communicated to court-appointed counsel. The latter, in a letter to the trial judge, dated September 11, 1961, after pointing out that he could not in good conscience raise objections to the verdict or sentence or participate in an effort to secure a new trial, requested permission to withdraw from the case (R. 20-21). On September 12, 1961, the Court granted his request (R. 22).

Petitioner's new counsel thereupon filed a motion for new trial on general grounds (R. 24); and thereafter filed an amendment (R. 28) and supplement (R. 33) to the motion, with supporting affidavits, raising for the first time the constitutional validity of petitioner's indictment, trial and conviction because of the systematic exclusion of Negroes from grand and traverse juries in the Superior Court in Jasper County, including the grand jury which indicted and the traverse jury which convicted petitioner in the instant case. In addition, this extraordinary motion asserted that there had been no valid or intelligent waiver of, or authorization given court-appointed counsel to waive, petitioner's constitutional right to be indicted and tried by a grand and petit jury chosen under a system in accord with basic constitutional requirements (R. 28); and that at no time in the history of Jasper County had any white attorney defending a Negro on a criminal charge challenged the constitutional validity of the jury selection system employed in the county (R. 29).

Petitioner introduced into evidence in support of his claim the sworn statements of county officials, Frank R. Ezell, the Sheriff, and C. B. Pound, Deputy Clerk of the Superior Court of Jasper County, who had held their positions for 21 and 30 years, respectively. These officials asserted that no Negroes had ever served on the grand or traverse jury in the county in 30 years; that no names of

Negroes had ever been placed on the jury lists; that there were no Negroes on the grand or traverse jury involved in petitioner's case. Each of these officials named ten Negroes whom they believed to be intelligent and upright citizens in the county (R. 165-166, 169-170; 177-180, 182-184). Those so named were property owners and their names, therefore, appeared in the current tax digest of the county (R. 157) which contained a listing of 615 Negroes and 2,076 whites (R. 41). These officials further stated they had never heard counsel for a Negro defendant raise any constitutional objection to the composition of the jury panel from which the names of grand and traverse jurors were drawn (R. 166, 169; 178, 183).

The 1960 Census figures were introduced, which showed that the population of Jasper County was 6,135 of which 2,832 were white and 3,303 were Negro; that there are 857 white males, 993 white females, 721 Negro males and 833 Negro females over 21 (R. 43-44). There had been 177 graduates from the local high school for Negroes, the Jasper County Training School, since 1954 (R. 46); that there are 461 Negroes and 1,895 whites on the voters list of the county (R. 183-184).

Petitioner himself stated by affidavit that he had had no prior experience in court or with lawyers; that he did not intend to waive any of his constitutional rights and had not instructed his court-appointed counsel to waive any of his rights (R. 39). Newly engaged counsel for petitioner filed an affidavit expressing the belief that court-appointed counsel had no experience in the raising of the constitutional issue pertaining to the arbitrary and systematic exclusion of Negroes from grand or petit juries in the county, and that had counsel possessed sufficient knowledge to raise the question, he would not have felt it to be in his best interest, as a white lawyer practicing in and around Jasper County, to raise the issue in this case; that because of lack of knowledge, experience and tender age, petitioner not only did not waive his constitutional rights, but was incapable of intelligently so doing (R. 36-37).

Sworn statements of petitioner's court-appointed counsel were also introduced into evidence, showing that he had been a member of the Georgia bar since January 30, 1934; that he had defended between 200-500 Negroes charged with felonies; but that he had never seen a Negro serving on a traverse jury in the county (R. 186, 189). Moreover, he had never in any of the cases he handled challenged the illegal composition of the jury or raised the issue of the Negro's systematic exclusion therefrom, because he had never seen a jury panel in Jasper County from which a fair and impartial jury could not be obtained, so as to assure the defendant a fair and impartial trial, even though there were no Negroes on the panel; that if he had felt in the instant case that a fair and impartial trial could not be had, or that a more favorable verdict could have been anticipated, timely objection would have been made (R. 186, 189-191). He asserted that he had had lengthy conversations with petitioner; that he knows how to raise constitutional issues and would not have hesitated to have raised such issues in this cause, had he believed it to be in the best interest of petitioner (R. 237).

He further stated that he had made a statement to the press, pointing out that the statistics showing a higher rate of homicide among Negroes than whites was to be expected since the American Negro had been exposed to civilization for only 200 years or less, compared to several thousand years for whites (R. 191).

Affidavits from fellow attorneys, expressing confidence in Mr. Warren's experience, skill and integrity and belief that he would not have hesitated to raise any constitutional issue he believed to be in petitioner's best interest, were introduced into evidence by the state (R. 194-236; R. 240-250).

The extraordinary motion for a new trial was overruled by the trial court (R. 104-106), the court finding that court-appointed counsel had represented petitioner with ability and in good faith, and that he was properly qualified to

raise the constitutional issues set forth in the extraordinary motion for new trial; that in the composition of the grand and traverse jury boxes, the names of Negroes do not appear and that this fact was known to court-appointed counsel; that the issue was raised for the first time in the extraordinary motion for a new trial, but that the challenge to the legality of the jury selection system came too late, since failure of petitioner's counsel to make appropriate objections before indictment or at the outset of the original trial constituted a valid waiver of petitioner's constitutional rights (R. 104-106). Petitioner sought review in the Georgia Supreme Court, and that court, as aforesaid, on May 14, 1962, affirmed the judgment of the trial court (R. 284), and petitioner brings the cause here.

Question Presented

Whether petitioner, a poor, rustic and unsophisticated 15-year old Negro youth of limited education, on trial in a rural county in Georgia for the murder of his white employer, can be held to have made a valid waiver of his constitutional right to object to the systematic exclusion of Negroes from the grand jury which indicted, and the traverse jury which tried and convicted him, in the absence of an affirmative showing that he (or his parent or guardian) understood what his rights were, fully appreciated his entitlement to challenge the jury and the meaning of failing to do so, and acquiesced in the decision of court-appointed white counsel not to assert petitioner's guaranteed right to be indicted and tried by a grand jury and traverse jury which conformed to basic constitutional requirements?

Reasons for Allowance of the Writ

1. Under a long and undeviating line of decisions of this Court, the Fourteenth Amendment's mandate of equal protection of the laws and procedural due process is violated where a Negro defendant in a capital case is indicted,

tried and convicted by grand and petit juries chosen from jury lists from which Negroes have been arbitrarily and systematically excluded because of race. *Strauder* v. *West Virginia,* 100 U. S. 303; *Ex parte Virginia,* 100 U. S. 339; *Neal* v. *Delaware,* 103 U. S. 370; *Norris* v. *Alabama,* 294 U. S. 587; *Hale* v. *Kentucky,* 303 U. S. 613; *Akins* v. *Texas,* 325 U. S. 398; *Shepherd* v. *Florida,* 341 U. S. 50; *Williams* v. *Georgia,* 349 U. S. 375. Where a jury selection system discriminates against Negroes, or prevents their being chosen to serve as jurors, indictments and verdicts returned by juries, thus unconstitutionally composed, against Negro defendants cannot stand where appropriate challenge is made. *Patton* v. *Mississippi,* 332 U. S. 463; *Avery* v. *Georgia,* 345 U. S. 559; *Anderson* v. *Alabama,* 366 U. S. 208.

Evidence was introduced in the trial court to establish that: there are 3,303 Negroes and 2,832 white persons in Jasper County; that under Georgia law, Section 59-110 Georgia Code Ann., jury commissioners are required to select from the books of tax receivers "upright and intelligent" citizens to serve as jurors; that the tax digest for 1961 for Jasper County contains the names of 615 Negroes; that between 1954 and 1961 at least 177 Negro residents in the county graduated from high school; that the Sheriff of the County, who had held the position for 21 years, had never heard of or seen a Negro serving on either the grand or traverse juries before or during his tenure, and yet he knew and named a group of Negroes in the county whom he could classify as "upright and intelligent," and among those named were Negro property owners; through the testimony of the Deputy Clerk and Clerk for the Board of Jury Commissioners, who had held these posts for 30 years, that no names of Negroes had ever been on the grand or traverse jury lists of the county during his tenure in office, and no names of Negroes had been on the jury panels from which

the grand and traverse juries under attack in this case were chosen, even though he too named Negroes whom he classified as "upright and intelligent."

This evidence, which was uncontroverted, clearly makes out a prima facie showing that Negroes have been systematically excluded from serving on the grand and traverse juries in Jasper County over a long period of years; that they were arbitrarily barred from serving on the juries chosen in this case, in violation of petitioner's right to equal protection of the laws and to procedural due process. *Norris* v. *Alabama, supra; Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Akins* v. *Texas, supra; Patton* v. *Mississippi, supra; Cassell* v. *Texas,* 339 U. S. 282; *Hernandez* v. *Texas,* 347 U. S. 475; *Reece* v. *Georgia,* 350 U. S. 85; *Eubanks* v. *Louisiana,* 356 U. S. 584. This showing standing alone would be sufficient to entitle petitioner to a new trial.

Although the issue was not raised before arraignment or during trial, *Crumb* v. *State,* 205 Ga. 547, 54 S. E. 2d 639; *Williams* v. *State,* 210 U. S. 665, 667, 82 S. E. 2d 217, remanded for reconsideration, 349 U. S. 375, reconsidered and affirmed, 211 Ga. 763, 88 S. E. 2d 376, cert. denied, 350 U. S. 950, it does not come too late, when raised by extraordinary motion for new trial, where appropriate opportunity was not afforded a defendant to make "objections to the illegal composition of the grand jury or traverse jury before indictment or during the progress of the trial."

2. The dispositive issue in this cause is whether petitioner effectively waived his right to object to the systematic exclusion of Negroes from the grand jury and traverse juries of Jasper County, when no appropriate challenge to the composition of either jury was made by petitioner's court-appointed counsel before indictment or during the course of the trial. Determination of this controlling consideration requires the granting of this petition to enable

this Court to make an independent evaluation of the evidentiary facts in the record, in order that it may determine for itself whether the particular facts and circumstances, including the background, experience and conduct of petitioner, warrant the conclusion that petitioner has made a valid waiver of his constitutional right to procedural due process mandated by the decisions of this Court. See *Johnson* v. *Zerbst*, 304 U. S. 458; *Von Moltke* v. *Gillies*, 332 U. S. 708, *Tomkins* v. *Missouri;* 323 U. S. 485; *Rice* v. *Olsen*, 324 U. S. 786; *Emspak* v. *United States*, 349 U. S. 190; see also *Norris* v. *Alabama, supra,* at page 590; *Chambers* v. *Florida*, 309 U. S. 227, 228; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Fay* v. *New York*, 332 U. S. 261, 272; *Spano* v. *New York*, 360 U. S. 315; *Hudson* v. *North Carolina*, 363 U. S. 697, 703.

3. The decision of the court below, that a valid waiver of petitioner's right had been made, was reached without regard to those considerations and factors deemed controlling by this Court. See *Johnson* v. *Zerbst, supra*; *Von Moltke* v. *Gillies, supra; Pennsylvania* v. *Claudy*, 350 U. S. 116; *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441; *Emspak* v. *United States, supra; Tomkins* v. *Missouri, supra; Moore* v. *Michigan*, 355 U. S. 155, 161, 164; *Glasser* v. *United States*, 315 U. S. 60, 70; *Smith* v. *United States*, 337 U. S. 137, 150; *Gibbs* v. *Burke*, 337 U. S. 773, 780; *Rice* v. *Olsen, supra; Hodges* v. *Eaton*, 106 U. S. 408, 412; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 306; *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 394; see also *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (CA 5, 1959); *Wood* v. *United States*, 128 F. 2d 265 CA DC, 1942); *Williams* v. *Huff*, 146 F. 2d (CA DC, 1945); *Hallowell* v. *United States*, 197 F. 2d 926 (CA 5, 1952).

Petitioner is a Negro, 15 years of age at the time of his trial and conviction below. He is one of nine fatherless children and completed the eighth grade in school, but had left school for good approximately a year or more before

trial. His family was poor and not well educated or informed. He was reared in the rural South and apparently had begun to work as a share cropper or tenant farmer on the land of the decedent. He was unfamiliar and inexperienced with court procedures and in dealing with lawyers. He was accused of killing a white man.

The gravity of the charge, the apparent brutality and cold-bloodedness of the crime, the fact that petitioner had never been in trouble before, his limited education, immaturity, the handicap of his race, the fact that the decedent was white and the setting in which the trial took place are elements crucial to a sound evaluation of whether petitioner has waived his rights.

An additional factor, which must be weighted, is that petitioner was defended by court-appointed white counsel. While counsel was unquestionably an experienced and a respected member of the bar, no great professional skill is manifested in this case. Indeed, the record discloses only the most perfunctory defense. Moreover, when consideration of this pro forma handling of the defense is coupled with the knowledge that the attorney involved, who had defended between 200 and 500 Negroes on felony charges, had never seen a Negro on the traverse jury in Jasper County, nor challenged the validity of the jury system, a serious question is raised as to whether failure to challenge the illegal composition of the grand and traverse juries deprived petitioner of effective counsel within the meaning of the decisions of this Court. See *Powell* v. *Alabama*, 287 U. S. 45, 58; *House* v. *Mayo*, 324 U. S. 42, 46; *Von Moltke* v. *Gillies, supra; Avery* v. *Alabama*, 308 U. S. 444; *Glasser* v. *United States, supra; White* v. *Ragen*, 324 U. S. 760; *Hawk* v. *Olsen*, 326 U. S. 271; and see *United States ex rel. Goldsby* v. *Harpole, supra.*

The statement of court appointed counsel that he had always declined to assert this basic constitutional claim be-

cause he "had never seen a jury panel in Jasper County from which a fair and impartial jury could not be obtained", even though Negroes were excluded therefrom, does not constitute a careful and considered judgment that it was in petitioner's best interest to be tried by the particular jury in this case. On the contrary, counsel's decision seems more likely the product of Southern folkways—that it is in the Negro's best interest not to assert or seek to enforce his constitutional rights. Such decision is solely that of court appointed white counsel and, petitioner respectfully submits, cannot be binding upon him.

This Court has long held that waiver of fundamental rights is not lightly to be inferred, and that every reasonable presumption against waiver of basic guarantees must be indulged in by the courts. See *Smith* v. *United States, supra; Moore* v. *Michigan, supra; Emspak* v. *United States, supra; Tomkins* v. *Missouri, supra.* Such a waiver takes place only when made understandably, intelligently, competently, voluntarily, and with full apprehension of the nature of the right being given up and the consequences of its forfeiture. See *Von Moltke* v. *Gillies, supra; Johnson* v. *Zerbst, supra; Gibbs* v. *Burke, supra.* Determination of this question requires evaluation of the circumstances of each case, including the age, education, background of the accused and the gravity of the offense. See *Johnson* v. *Zerbst, supra.* Inferences against waiver are such factors as the youth, emotional disturbance, limited intelligence, handicap of race and immaturity of the accused, and any other consideration which would mitigate against a conclusion that an intelligent, competent and voluntary waiver of fundamental rights with a full appreciation of all the factors involved, occurred. See *Pennsylvania* v. *Claudy, supra; Uveges* v. *Pennsylvania, supra; Rice* v. *Olsen, supra; Von Moltke* v. *Gillies, supra; Gibbs* v. *Burke, supra; Palmer* v. *Ashe,* 342 U. S. 134; *Moore* v. *Michigan; supra; Johnson* v. *Zerbst, supra; Glasser* v. *United States,*

supra; Williams v. *Huff, supra; Hallowell* v. *United States, supra.* Here, in the absence of a showing that court-appointed counsel consulted with petitioner and explained his rights fully and completely and the consequences of his failure to assert same, it cannot be said that the standards applied by this Court were followed by the court below.

It should further be pointed out that the trial court in this case has openly deviated from its basic constitutional responsibility mandated by this Court for well over 50 years. This deliberate breakdown in the proper administration of justice weighed against the importance of the claims petitioner asserts requires, it is respectfully submitted, that petitioner should be allowed to prevail, unless clearly and conclusively foreclosed.

5. The decision below is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *United States ex rel. Goldsby* v. *Harpole, supra.* In that case the court took judicial note of the fact that lawyers in the South rarely, almost to the point of never, assert on behalf of a Negro defendant his constitutional right to indictment and trial by a jury selected under a system free of discrimination. There, the conviction of the Negro defendant was held to be invalid, even though white counsel was counsel of the defendant's own choosing. Here, where there is a local court-appointed counsel, the conclusions which led to reversal in the *Goldsby* case are reinforced. The irreconcilable conflict between the Court of Appeals and the court below on the instant question should be resolved and settled by this Court in this case.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

DONALD L. HOLLOWELL,
859½ Hunter Street, N. W.
Atlanta 14, Georgia,

Attorneys for Petitioner.

BARBARA A. MORRIS,
HORACE T. WARD,
of Counsel.

APPENDIX

Opinion of Supreme Court of Georgia

Decided: May 14, 1962.

BY THE COURT:

1. Grounds of a motion for new trial not insisted upon in oral argument or by brief will be treated as abandoned.

2. Exclusion of a segment of citizens on account of race or color is grounds for timely challenge to the array of grand jurors and traverse jurors, and in some cases the objection to the grand jury may be interposed by plea in abatement.

3. Objection to the composition of a grand jury must be raised by challenge to the array duly presented before the indictment is returned or plea in abatement filed before arraignment. A like objection to the traverse jury must be raised by challenge to the array at the earliest opportunity the defendant has to avail himself of that right.

(a) If he fails to do so, the objection is waived and can not thereafter be made a ground of a motion for new trial.

4. Where a person accused of a crime is not afforded the opportunity to make appropriate objections to the illegal composition of the grand jury or the traverse jury before indictment or during the progress of the trial, he may raise the issue by motion for new trial or by habeas corpus proceedings.

5. Where the accused has attained the age when he may be legally put upon trial for a criminal offense, but lacks intelligence, experience, or knowledge sufficient to enable him to decide upon whether the waiver of a legal or constitutional right is beneficial to his defense, such waiver

may be made in his behalf by counsel appointed by the court to defend him.

6. Where, upon the hearing of an extraordinary motion for new trial in a criminal case, competent evidence is submitted to authorize the conclusion that counsel appointed to defend the accused was capable of raising a particular issue, and did not refrain from doing so because of reasons personal to himself, the findings of the trial judge that the court-appointed counsel was competent and not derelict in his duty in the matter can not be disturbed by this court.

Preston Cobb, Jr., was indicted by the grand jury for the August term of Jasper Superior Court for the murder of Coleman Dumas, Sr., on June 1, 1961. On August 16, 1961, he was convicted of the offense charged in the indictment.

The defendant's mother, Leathy Cobb, was a household servant in the home of the deceased. She reported for work on June 2, 1961, at which time she found blood on the back of the rocking chair and on the floor beside the chair. She noticed that the deceased's station wagon was not in the driveway and observed that blood was on the driveway at a point where the station wagon was ordinarily parked. She immediately notified Coleman Dumas, Jr., who informed the sheriff and the deputy sheriff of Jasper County of the situation, and he together with a posse of officers from Jasper County, the adjoining county of Jones and members of the Georgia Bureau of Investigation began an intensive search for the deceased and the person who had driven his station wagon away.

At about two o'clock on June 2, 1961, the deceased's son, Coleman Dumas, Jr., discovered his lifeless body lying in a ditch on the public road leading from the Dumas place to Hillsboro, between Barron Fulton's home and General Fulton's house.

Coleman, Jr., summoned the officers, who testified that upon their arrival the body had not been moved. They

examined the body and discovered bloody trousers also lying in the ditch. The officers from the G. B. I. gave as their opinion that the deceased had been shot with a .22 cal. rifle in the back of his head. At about 5:30 on the same afternoon the defendant Cobb was apprehended in company with Marshall Tinsley leaving the yard of the colored school in Monticello. The deceased's station wagon was being driven by Tinsley.

Upon interrogation, the defendant gave the officers a detailed account of the manner in which he killed Mr. Dumas, robbed him and spent most of the money he found on the deceased's person. The defendant's mother, who appeared as a witness in his behalf, testified that the defendant was, on the afternoon of the homicide, engaged in helping Coleman Dumas, Jr., put gravel out around a fish pond. The deceased was also, according to her testimony, present. She said that, some time before 4:30, the defendant left the Dumas place and shortly thereafter she went home, but did not find him there nor did she see him again until after his arrest.

The defendant in a statement to the officers gave an account of his activities shortly before the fatal shooting until the time of his arrest. He related that "I got on a school bus about 5:30 and went to Hillsboro and a store there and bought cigarettes; started walking and caught a ride on a truck to a grave yard and then walked almost to the Dumas home; returned to Hillsboro and bought more cigarettes, and caught another ride back to the church in front of my house, and walked back to Mr. Coleman's house; went across the road in front of his house and sat down 15 or 20 minutes; went in the yard and got a rifle from the station wagon, and sat it beside the door steps at the back door; then I went in the house.

"Mr. Coleman looked around and asked me what I wanted, I told him nothing and walked back out the kitchen door and got the rifle and went back in the house, stood by

the table in the kitchen and shot him while he was sitting in the chair in the living room; set the rifle back outside the door, and went back in the house and got him and laid him down on the walk next to the car to open the door; put him on top of the spare tire in the back of the station wagon; then went back by the door steps and got the rifle and put it in the station wagon; came back up the road and turned to the right, came by Beck Coggle's house and up the road by Barron Fulton's house and stopped just around the curve from Barron Fulton's house, opened the back of the station wagon, picked him up and put him in the ditch.

"Threw out a pair of bloody pants in the ditch; he was laying on his back; the right rear tire went flat when I left Mr. Coleman's yard, after I put Mr. Coleman in the ditch, I went back to Bud Maddox's store and changed tires, and borrowed a jack from Bud Maddox and the jack would not work; while I was putting jack back Marshall Tinsley came by and I got a jack from him and Marshall helped change the tire; then I followed Marshall, who was driving his aunt's car" to Beck Coggle's house. Cobb then decribed how he picked up several friends and drove to a beer joint near Round Oak where they purchased beer, cigars and wine. He then related that they went to a girl's house, picked her up and returned to the beer joint where they purchased more beer and played records; returned the girl to her home and Marshall drove to Monticello and the school there, left and came by a store where they conversed with one Jessie Thurman; then let a boy out at Beck Coggle's house; "then Marshall and I went back to the Turner place about 1:30 in the morning and went to sleep and slept till day break"; left there and went to Macon and turned around at a car lot in Macon and came back through Gray to Eatonton about 9 o'clock in the morning; parked close to a white barber shop in Eatonton and went to a store where I bought black pants, blue shirt and shoes and red and black socks; went to a supermarket and got some ice cream; then we drove to Shady Dale, picked up

another boy at a store there and started to Monticello, and then went to the colored school; "got out at the school house, and we started to leave and then they stopped me."

Cobb stated to the officers: "When I took Mr. Coleman out of the car, his pocketbook fell out of his pocket, I picked it up and put it in the car; on the way to Macon I gave out of gas near Round Oak," and caught a ride back to Mr. Crutchfield's and bought gas, and then drove back and bought more gas; also bought gas in Macon, and a station at the forks of the Eatonton and Shady Dale road. Cobb recounted exactly how much he spent for gasoline at each place and how much he paid for the shoes, socks, pants, and the shirt he purchased at Eatonton. He said further: beside "the $20 gold piece, which Mr. Ezell got out of my pocket, I got out of Mr. Coleman's pocketbook also $28; I took all of his papers out of his pocketbook, and put them in mine; I tore up the pocketbook and put it in front of the brick store at Round Oak. About 2 weeks ago Mr. Coleman and I went fishing; the next day he asked me if I ate all of the fish; I asked him what fish; then he cursed me; after I fed the calves I left and went home; on yesterday which was June 1st, I made up my mind to shoot him; while unloading gravel at the fish pond Mr. Coleman brought up about the fish and told me I had better be careful how I talked to an old man like him, he said he was too old to be playing and that he might blow my brains out at any minute; this was about 4:30 and I made up my mind to kill him; I went to my house and got my brother's pistol, and left the pistol across the road in front of Mr. Coleman's house."

Cobb said that Mr. Dumas was sitting in the chair with his hat on, reading the Market Bulletin; that he subsequently put the hat in the station wagon; that Mr. Dumas was sitting in the chair with his side turned to the door, and he shot him right over his ear; that he threw the dirty pants out of the station wagon in the ditch when he put

Mr. Dumas in the ditch; that he unloaded the rifle, he killed Mr. Dumas with, on the back steps, and threw the hull of the shell off on the left side of the back steps in the grass.

By testimony of different witnesses the rifle was identified, the hat with the holes in it, made apparently by the rifle bullet, was found, the pocketbook the defendant said that he took from the body of the deceased containing a twenty-dollar gold piece and other money was located at the place he said it would be found, and near the back door of the Dumas home, the spent shell of the .22 rifle was discovered (where the defendant stated it was ejected from the rifle). The body of Dumas when located by his son, Coleman, Jr., and afterwards seen by the officers was at the point on the highway where the defendant stated he had placed it. In every detail the defendant's confession was corroborated by physical facts.

The officers testified that the defendant reported to them that the deceased was alive after he was shot, when he was placed on the ground beside the station wagon and later when placed in the station wagon, but was dead when placed in the ditch. There was testimony that the Dumas home, the ditch where the deceased was placed, and the roadway between them were in Jasper County.

The defendant made a statement: "I want to tell them that I am sorry, and he kept telling me about he was going to blow my brains out, and then I got mad; then I made up my mind to kill him, and after I did, I was sorry. I'm just 15 years old; I quit school in the 9th grade. I was mad with Mr. Dumas because he kept telling me he was going to blow my brains out. I was afraid of him, one while, before I did it. But the day I did it, I was not afraid of him that day. I shot him with the pistol, with a .22 long hollow point bullet."

In answer to the question: "Anything else you want to tell the jury now?" Cobb replied: "No sir, I guess that's all."

The defendant's mother, in a very frank and honest manner, gave as her evidence that the episode involving "the fish" preceded the killing of Mr. Dumas by "a week or two." Her version of the matter was that on the morning after the fishing excursion had taken place the defendant came to the Dumas home where Mr. Dumas was mixing milk to be given a calf. She related that the defendant helped about the Dumas premises and assisted Mr. Dumas in looking after the cows. Concerning the particular morning in question she stated: "Well, when he walked in that morning, Preston walked in, Mr. Dumas asked him, he said Dude, did you eat all your fishes last night, and he said what fishes, and so well he cursed him and said you know what fishes I'm talking about, and he was mixing up some milk for the little calf. Mr. Dumas was; and he said you look like a damn pretty fool if I had turned around and dashed this milk in your face, and he said here take this milk and carry it out there and give it to the calf; so he took the milk and carried it on out there, and that was all that was said."

The mother testified that, when the defendant was in the presence of Mr. Dumas on the afternoon of the killing, she was also present and heard all that took place between them. According to her recollection, there was no mention of the fish and she did not hear Dumas threaten her son on that occasion. She testified that her son, Preston, did not appear to be afraid of Mr. Dumas. She said Preston was always a quite orderly child and had not stayed out at night; that he was somewhat reticent and retiring. She gave as her account of his school work that his marks had been satisfactory until the year before, when he quit school in the 8th or 9th grade.

The above stated facts constitute a resume of the material aspects of the evidence adduced upon the trial and give a fair summary of what was proved.

The defendant's appointed counsel, J. Ben Warren, withdrew from the case after the judgment of the court. Other retained counsel, D. L. Hollowell and H. T. Ward, filed in his behalf a motion for new trial on the general grounds and thereafter amended by adding a special ground. Later, what is characterized as a supplement, but was simply a second amendment, was filed by new counsel. The special ground of the amended motion set up: that the defendant was denied equal protection and due process of the law guaranteed by the Constitution of the United States and the Constitution of Georgia, for the reason that he was not indicted by a grand jury or tried by a petit jury which was legally composed, in that:

Negroes are and have been for many years systematically and arbitrarily excluded from serving on grand juries and petit juries in Jasper County, Georgia.

There are Negroes listed upon the tax digest of Jasper County and who are landowners possessing sufficient uprightness, experience and intelligence to serve on duly and legally selected grand juries and petit juries.

The defendant at no time intelligently waived or authorized his counsel appointed by the Honorable Court to waive his constitutional right to be tried by a fair and impartial jury which was legally composed, and not to be discriminated against because of his race and color. Further, that because of his tender age and lack of experience, the defendant was not capable of intelligently waiving his constitutional right not to be discriminated against because of his race and color in the selection of the grand jury which indicted him or the petit jury by which he was tried.

At no time in the history of Jasper County has any white lawyer defending a Negro in a criminal case ever legally raised the issue of the right of any Negro not to be discriminated against because of his race and color as

a result of the systematic and arbitrary exclusion of Negroes from service upon grand juries and petit juries in the County of Jasper; nor, is it to be expected that any such white attorney in the County of Jasper representing a Negro charged with the murder of a white man in that county would raise such an issue.

The supplemental motion (second amendment) further alleged; that the allegations of the amended motion heretofore filed were adopted and that counsel for the defendant believed said allegations to be true; that this was the first opportunity for the issues enumerated in the amendment to be raised since said attorney became counsel of record; that, since becoming counsel for the defendant, said counsel had been diligent in pursuing the investigation of this case; that the facts alleged were material and not merely cumulative; that, had said allegations been timely raised as issues in the original trial, a different sentence might well have been effected, if not the verdict; that, in support of the allegations of the amendment affidavits were attached as exhibits; that a new trial should have been granted in this case because of the allegations made.

Supporting the two amendments to the motion for new trial, the defendant's counsel offered oral and documentary evidence as follows:

D. L. Hollowell, counsel for the defendant, stated that court-appointed counsel did not raise all the constitutional rights to which the defendant was entitled; that he believed court-appointed counsel had no experience in the raising of the constitutional issues pertaining to systematic exclusion of a race from jury duty, but even if he had the knowledge and technique, he would have felt it not to be to his best interest, as a white lawyer, to raise such issue in Jasper County: that this was not critical of the lawyer, but was based on experience and accumulated knowledge of the affiant.

Hollowell further deposed that, because of lack of knowledge and experience and his tender age, the defendant not only did not waive his rights, but was incapable of doing so; that, on information and belief, there were many upright, intelligent, and experienced Negroes in Jasper County, and yet they had been systematically excluded from service on a grand or petit jury for 30 years.

Preston Cobb, Jr., the defendant, swore that prior to his trial he had never had dealings with any kind of court or lawyer; that he had no experience with court procedures nor instruction in the operation of a court; that he did not intend to waive any constitutional rights which may have been his; that he did not request or instruct court-appointed counsel to waive any rights; that the affiant was desirous of having his present counsel raise any and all issues which go to preserving or safe-guarding any rights which he has.

The movant offered evidence as to the total population of Jasper County according to the 1960 census. This was broken down by race, sex and age to show more than 53% of the total population were Negroes; that slightly less than 46% of those over 21 were Negroes, and of this subtotal about 21% (721) were Negro males. There was further evidence that at least 177 students had graduated from the colored high school since 1954, and there was a listing introduced naming 13 Negroes, among others, as owning property in Jasper County.

By affidavits of the Tax Commissioner, there were 2,076 white residents, whose tax assessments were $108,772.08, and 615 colored residents, whose tax assessments were $6,176.39, on the 1961 Jasper County Tax Digest.

There were also affidavits by new counsel that they could not have discovered the evidence (contained in the motion for new trial) by exercise of ordinary diligence prior to the verdict, since they were not counsel at that time, but after being retained, they did raise the issues with diligence and dispatch.

Interrogatories addressed to two county officials revealed that they knew intelligent and upright Negro citizens in Jasper County; however, they were not more intelligent than the duly constituted jurors; that no lawyer had raised the constitutional question of systematic exclusion of Negroes from juries, although no Negro had served on such juries, to the official's knowledge, for 30 years. Further, there were 1,895 white voters and 461 Negro voters on the voters' list for Jasper County.

J. Ben Warren, former counsel of the defendant, testified by interrogatories propounded to him that he had been an attorney since January 30, 1934; that he had defended between 200 and 350 Negroes charged with felonies; that Negroes had not served on juries during his practice; that he knew several hundred Negroes in the county; that he had never raised the constitutional issue as to exclusion because he had not seen a jury panel from which a fair and impartial jury could not be obtained for a fair trial even though no Negro served; that, if he felt the defendant could not have obtained a completely fair and impartial trial or that a more favorable verdict might be expected if two or three Negroes were included on the panel, he would have made a timely and proper objection. In his opinion, the inclusion of Negroes on the juries would not have affected the verdict; hence, such objection was useless, and probably would have resulted adversely to the defendant.

In rebuttal of the contentions and evidence offered by counsel for the defendant, the following evidence was adduced:

There were numerous affidavits by lawyers in the Ocmulgee Circuit introduced on behalf of J. Ben Warren stating, by consensus, that he had graduated from Emory Law School, had practiced law for 24 years, was of impeccable character, with an excellent reputation for honesty and integrity; that he was fearless, experienced and thoroughly

competent, with above average knowledge, legal skill and acumen; that he could and would take any action necessary to protect the rights of his client; that he was thoroughly proficient and perfectly capable of raising any constitutional issue in defense of his client; that, if he felt that it would have resulted in any benefit or advantage to the defendant or aided the protection of his life, liberty, or freedom, Warren would have raised such issue without heed of personal consequences.

He was, in short, fully qualified and able to conduct the defense of the accused in a criminal case according to the highest legal standards, and would exercise his best judgment as to all aspects of the case.

Warren, by affidavit, stated that, after his appointment to represent Cobb, he had lengthy conversations with the accused and exhaustively obtained from him his contentions insofar as the charged offense was concerned; that he also had extensive and searching conversations with Marshall Tinsley, a key witness; that he was familiar with the manner in which constitutional issues are raised in criminal proceedings and, should he have thought it in the best interest of the defendant, he would not have hesitated to raise any constitutional issue, and no personal interest would have prohibited him from doing so.

He further pointed out that the presence of Negroes on the jury would not have affected the verdict; that the best defense, in his considered opinion, open to the defendant was his age, and that issue was presented to the jury by evidence and oral argument to the jury on the part of affiant on behalf of the defendant.

It is noted that neither while the trial was in progress, nor before the verdict was returned, does the record disclose that the original counsel who represented the defendant under appointment by the court presented any challenge to the jury or grand jury on the grounds that it

was not legally composed in that members of the Negro race had been systematically excluded from the jury box.

The superior court judge, after hearing the motion for new trial denied the same and declined to set aside the verdict of the jury.

QUILLIAN, Justice.

1. The general grounds of the motion for new trial were not orally argued or discussed by brief filed in behalf of the defendant in this court. It follows that the general grounds must be treated as abandoned.

2. The single exception now before this court is that the rights of the defendant guaranteed by the Fourteenth Amendment to the Constitution of the United States were denied him because he was a Negro, and Negro citizens of Jasper County eligible for jury duty were systematically excluded from the grand jury that indicted him and the jury before whom he was tried. This court has consistently held that the illegal exclusion of a segment of citizens on account of race or color is grounds for timely challenge to the array of grand jurors and traverse jurors, and in some cases the objection to the grand jury may be interposed by a plea in abatement. *Wilson* v. *State*, 69 Ga. 224; *Crumb* v. *State*, 205 Ga. 547 (54 S .E. 2d 639).

3. Objection to the composition of a grand jury must be raised, if at all, by challenge to the array duly presented before the indictment is returned or by plea in abatement filed before arraignment. A like objection to the traverse jury "put upon" the accused in a criminal case must be raised by challenge to the array at the earliest opportunity the defendant has to avail himself of that right.

Ordinarily the issue as to whether a particular segment of citizens eligible for jury duty has been systematically excluded from the jury box of the county cannot be raised

for the first time after the trial, verdict of guilty and imposition of sentence by motion for new trial. "It is settled law in this State that when a panel of jurors is put upon the prisoner, he should challenge the array for any cause which would go to show that it was not fairly and properly put upon him, and that if he fails to do so, the objection is waived and cannot thereafter be made a ground of a motion for new trial. See *Lumpkin* v. *State,* 152 Ga. 229 (109 S. E. 664); *Cornelious* v. *State,* 193 Ga. 25 (17 S. E. 2d 156); *Cumming* v. *State,* 155 Ga. 346 (117 S. E. 378); *Moon* v. *State,* 68 Ga. 687." *Williams* v. *State,* 210 Ga. 665, 667 (82 S. E. 2d 217); remanded for reconsideration, 349 U. S. 375 (75 S. C. 814, 99 L. E. 1161); reaffirmed 211 Ga. 763 (88 S. E. 2d 376); certiorari denied 350 U. S. 950 (76 S. C. 326, 100 L. E. 828).

4. An exception to this rule recognized by this court, and the Supreme Court of the United States, is that, where a person accused of a crime is not afforded the opportunity to make appropriate objections to the illegal composition of the grand jury or the traverse jury before indictment or during the progress of the trial, he may raise the issue by motion for new trial or by *habeas corpus* proceedings.

Counsel for the defendant contend that he was not given a fair opportunity to raise the question that the members of his race, qualified to serve as grand and petit jurors, were systematically excluded from the grand jury that indicted him and the petit jury before whom he was tried. They insist: (a) that the defendant was, at the time of indictment and trial, an ignorant Negro boy only fifteen years old, without the slightest knowledge of his constitutional rights or the manner in which the law required they be asserted; (b) that the court-appointed counsel who conducted the accused's defense on the trial of the case was inexperienced in raising the issues as to race discrimination in selecting the grand and traverse juries (whether there

was discrimination in excluding Negroes from the jury boxes of the county on account of their race), and was incapable of raising the issue; (c) that the court-appointed white lawyer, who being at the time of trial in a rural community where his fee-paying clients were predominantly members of his own race, could not, for economic reasons personal to himself, be expected to challenge the array of either the grand jury or the traverse jury, by plea in abatement, or other appropriate method protest that the names of Negroes competent and eligible for jury service were by discriminatory practices omitted from the jury lists and excluded from the jury boxes of the county; (d) that the defendant did not personally waive any constitutional or legal right; (e) that the court-appointed counsel was not clothed with authority to waive the particular constitutional right of the defendant to have the names of members of his race in the jury box, and that his failure to protest that point before indictment or while the case was in progress did not constitute a waiver of the defendant's rights as to that matter.

The insistence that where, as in the case under review, the accused on account of youth, inexperience, and ignorance was incapable of comprehending what his constitutional rights were, but that nevertheless his personal assent to any waiver of the same was necessary in order that he be precluded from insisting upon the same by motion for new trial made subsequent to indictment, trial, and conviction, and could not be waived by counsel who conducted his trial are decidedly adversely to the defendant in reported opinions of this court and the Supreme Court of the United States. In the case of Michel v. Louisiana, 350 U. S. 91 (1, 2) (100 L. Ed. 83, 76 Sup. Ct. 158), it is held: "Louisiana law requires that objections to a grand jury be raised before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever

is earlier. After expiration of the time allowed, these three Negro petitioners moved to quash their indictments on the ground that there was systematic exclusion of Negroes from the grand juries which indicted them. Their motions were denied and each was convicted of a capital offense. *Held*: In the circumstances of these cases, application of the rule to these petitioners did not violate the Fourteenth Amendment.

"Michel was indicted on February 19 and presented for arraignment on February 23. He appeared without counsel, and arraignment was continued for one week. The record shows that counsel was appointed for him on March 2, the date the grand-jury term expired. Counsel contended that he did not consider himself appointed until March 5, when he received written notice from the court. The motion to quash, not filed until March 9, was denied as being out of time. *Held*: The finding of the lower courts that counsel was appointed March 2 is sustained. Since the appointed counsel, a lawyer experienced in state criminal practice, had adequate time to file the motion after his appoinment, application of the rule was not unreasonable."

5. There are few better settled principles of criminal jurisprudence than that where the accused has attained the age when he may be legally put upon trial for a criminal offense, but lacks intelligence, experience, or knowledge sufficient to enable him to decide upon whether the waiver of a legal or constitutional right is beneficial to his defense, such waiver may be made in his behalf by counsel appointed by the court to defend him. Michel v. Louisiana, 350 U. S. 91, supra; Wilcoxin v. Aldredge, 192 Ga. 634 (15 S. E. 2d 873). See also Wilcoxon v. Aldredge, 193 Ga. 661 (19 S. E. 2d 499).

Where, as here, the defendant knows nothing of his rights or whether it would be strategically wise to waive them in certain situations, it would be to require a vain and

useless thing that he personally consent to such waiver. If appointed counsel had been compelled to consult and be controlled by the directions given him by his client, who was only fifteen years old, and according to his own insistence, knew nothing of law, courts or legal procedure, his usefulness would have been destroyed and the defendant would not have been represented by counsel within the meaning of Art. I, Sec. 1, Par. V of the Georgia Constitution (Code Ann. Sec. 2-105).

6. The issues as to whether the court-appointed counsel had ability to raise the issue as to the illegal composition of the grand and traverse juries of Jasper County, and whether he was derelict in the performance of his obligation to the defendant in not raising the issues were heard and determined adversely to the defendant by the trial judge. The judge had submitted to him evidence sufficient to support his findings that the appointed counsel, a man of unquestionable integrity, was an able attorney of long experience, skill, and ability, and that he was not derelict to his duty in defending the accused.

Judgment affirmed. All the Justices concur.

Judgment of the Supreme Court of the State of Georgia

Entered on May 14, 1962

This case came before this court upon a writ of error from the Superior Court of Jasper County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Order of Supreme Court of Georgia Denying Petition for Rehearing

Entered May 28, 1962

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Preston Cobb, Jr. v. The State.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.